

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA07-1177

ARTHUR L. BONE

APPELLANT

V.

RICHARD A. BARNARD and TERRY
BARNARD

APPELLEES

Opinion Delivered SEPTEMBER 10, 2008

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CV2006-11629]

HONORABLE JAY MOODY, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Arthur L. Bone appeals the May 14, 2007 order and August 2, 2007 judgment filed in Pulaski County Circuit Court granting the dismissal of his complaint and granting judgment in favor of appellees Richard and Terry Barnard. Appellant maintains that the trial court erred in granting appellees' motion for summary judgment, in granting appellees' prayer for damages for abuse of process, and in dismissing appellant's counterclaim for foreclosure. We affirm the trial court's ruling on each point.

The parties entered into a promissory note and mortgage when appellees agreed to purchase from appellant certain real property located in Sherwood, Arkansas, described as Lot 16, Block 9, Grandview Subdivision, Sherwood, Pulaski County, Arkansas. The note, signed on December 14, 1990, stated that appellees agreed to purchase the property for \$24,000, together with interest of ten percent per annum, with monthly payments of \$225 beginning

July 1, 1990, until the note was paid in full. Appellant brought suit on the note and mortgage in a foreclosure complaint filed October 6, 2006, alleging that appellees had failed to make a \$1,000 down payment and monthly payments. Appellees counterclaimed on October 30, 2006, alleging that a down payment had been paid. Further, appellees claimed to have paid a judgment on behalf of appellant in the amount of \$5,500, plus interest, which amount was to be credited against the promissory note. Appellees further alleged that appellant initiated two groundless foreclosure actions against them to wrongfully obtain their property. These suits were not successful.

Appellees state that appellant claims to have obtained a foreclosure against them in early 2006; however, appellees deny having ever been served with notice of such a proceeding. Appellees claim that appellant had a practice of refusing to cash the check payments he received from them on the property. After a confrontation at the property in March 2006, appellees began placing the payments in an escrow account. Appellees claim to have suffered damage due to appellant's malicious prosecution of civil proceedings against them and claim that appellant is guilty of abuse of process because of his either having obtained a fraudulent foreclosure decree or initiating a baseless foreclosure action.

Appellant answered the counterclaim and filed a motion to dismiss. Appellees responded with a first amended and substituted counterclaim filed December 21, 2006, which explains that appellant filed suit in Jacksonville Municipal Court in January 1993 against appellees for failure to show proof of payments on their mortgage. That suit was dismissed with prejudice on April 28, 1993, for lack of prosecution. On October 22, 1993, appellant

assigned his interest in the mortgage and note to Margaret Landis. Landis then assigned all of her interest to Investor's Finance Company. Another foreclosure action was filed on February 25, 1999, alleging a principal balance due of \$24,222.98. That action was dismissed on May 31, 2000, for lack of prosecution. On March 10, 2006, appellant initiated a statutory foreclosure against appellees in spite of the fact that appellant had assigned his right, title and interest on October 22, 1993, and was not entitled to utilize statutory foreclosure procedures. Appellees never received any notice of such a proceeding, learning of it through third parties who had seen the statutory foreclosure notice run in the Daily Record. Appellees also claimed appellant misrepresented his continued ownership of the note and mortgage and deliberately and intentionally induced them to make payments to him, when he no longer had an interest in the property. Appellees sought damages for this alleged fraud.

Appellees filed a motion for summary judgment on March 27, 2007, alleging that they were entitled to dismissal of the foreclosure complaint and \$27,675, which was the amount appellant admitted to having collected from appellees since 1993, when he in fact assigned his right, title, and interest in the note and mortgage to Margaret Landis. Appellant responded that he entered into a "straw person" transaction wherein he conveyed to Margaret Landis all of his right, title, and interest in and to the promissory note and deed of trust, who then immediately conveyed it back to Investors Finance Company. The assignment was recorded on December 22, 1997. Appellant argued that this assignment was in effect a conveyance back to him because Investors Finance Company was an unincorporated trade style used by him for

a time in the late 1990s. He claims that, therefore, no fraud was practiced against appellees.

The trial court granted appellees' motion to dismiss appellant's complaint and denied their motion for damages. An order was filed to this effect on May 14, 2007. Appellant then obtained a correction assignment from Margaret Landis, and on May 25, 2007, a counterclaim was filed by appellant which mirrored his complaint for foreclosure. Appellees filed a motion to dismiss the counterclaim, arguing that it was inappropriate and not provided for by the Arkansas Rules of Civil Procedure. Because the counterclaim was filed within twenty days from the trial date, the trial court ruled that its filing was untimely and dismissed it. The trial court granted judgment to appellees on their counterclaim for abuse of process in the amount of \$2,500, but denied their claims for fraud, conversion, and malicious prosecution. This appeal timely followed.

Summary Judgment

Summary judgment is to be granted by a circuit court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Bennett v. Spaight*, 372 Ark. 446, ___ S.W.3d ___ (2008). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *See id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *See id.* We view the evidence in a light most favorable to the party against whom

the motion was filed, resolving all doubts and inferences against the moving party. *See id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *See id.*

Whether the trial court erred in granting appellees' motion for summary judgment, dismissing appellant's complaint, is the first issue before this court. Appellant contends that he entered into a "straw person" transaction wherein he conveyed his interest in and to the promissory note and mortgage at issue to his sister, Margaret Landis, and that she immediately reconveyed her interest to Investors Finance Company. This assignment was recorded on December 22, 1997. Appellant claims that he used Investors Finance Company as an unincorporated trade style, and that he is and always has been the equitable owner of the note and mortgage. He argues that in dismissing his original complaint, the trial court failed to conclude that he was at all times the equitable owner of the promissory note and mortgage.

In support of this proposition, appellant cites *Wood v. Donohue*, 736 N.E.2d 556 (Ohio Ct. App. 1999), which discusses the doctrine of equitable conversion as related to land title, and *Cottrell v. Smith*, 112 So. 465 (Miss. 1927), which acknowledges legal title may be held by one and equitable title by another. Appellant herein claims that he is the equitable owner of the promissory note and mortgage and as the real party in interest, he brought the suit in his own name. He argues that an incomplete or faulty conveyance by Margaret Landis to Investors Finance Company was not sufficient to deprive him of his equitable interest and the right to bring the suit in his own name.

The Mississippi and Ohio cases cited by appellant do not support his contention. The *Cottrell* court held that Cottrell, who obtained legal title to the note sued upon by paying one dollar to the Mary Mac Plantation Company, the real owner in interest, must account to the plantation company for the money collected by him at the end of the suit and holds the note subject to all appellee's defenses thereto against the real owner. The *Wood* court dealt with the doctrine of equitable conversion and held that any loss in the property's value due to an accidental occurrence fell on the buyer as owner of the equitable title.

Here, appellant's argument ignores that the conveyance to Margaret Landis would remain in place when her later conveyance to Investors Finance Company proved faulty. The trial court determined that appellees were entitled to summary judgment on this issue, dismissing appellant's complaint for foreclosure. Reviewing the evidence in the light most favorable to the nonmoving party, and finding no material fact unanswered, we affirm the trial court's award of summary judgment.

Abuse of Process

In order to prove the tort of abuse of process, appellant had to establish the following elements: (1) a legal procedure set in motion in proper form, even with probable cause and ultimate success; (2) the procedure is perverted to accomplish an ulterior purpose for which it was not designed; and (3) a willful act is perpetrated in the use of process which is not proper in the regular conduct of the proceeding. *S. Ark. Petrol. Co. v. Schiesser*, 343 Ark. 492, 36 S.W.3d 317 (2001). This court has stated that the test of abuse of process is whether a judicial process is used to extort or coerce. *Routh Wrecker Serv., Inc. v. Washington*, 335 Ark. 232, 980

S.W.2d 240 (1998). The key to the tort is the improper use of process after its issuance in order to accomplish a purpose for which the process was not designed. *Id.*; see also *Harmon v. Carco Carriage Corp.*, 320 Ark. 322, 895 S.W.2d 938 (1995); *Cordes v. Outdoor Living Ctr, Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989). Thus, it is the purpose for which the process is used, once issued, that is important in reaching a conclusion. *Routh Wrecker, supra*.

Pursuant to this appeal, we must determine whether the trial court erred in granting appellees' prayer for damages for abuse of process. Appellant argues that there is a dearth of proof on the elements for abuse of process. Appellant admits to hiring an attorney to foreclose on the note and mortgage in 2006, and the attorney mistakenly utilized the statutory foreclosure procedure, which was unavailable to him. Appellant argues that even though the statutory foreclosure was a mistake, he was the successful bidder at the public sale and proceeded as the owner of the property as advised by his counsel. He claims that this was defective procedure as a result of error, and not the use of a lawful procedure to accomplish an ulterior motive.

Again, this argument ignores the evidence presented at trial regarding appellant's failure to accept payments tendered, his failure to notify appellees when he moved, and his failure to notify appellees when he assigned his interest in the property to Margaret Landis. Appellant tried at least two times to foreclose on the property, each time having his case dismissed for failure to prosecute. The trial judge did not err in determining appellant used the judicial process in a coercive manner.

Arkansas Rules of Civil Procedure 13 and 15

Finally, appellant claims that the trial court erred in dismissing his counterclaim for foreclosure of the note and mortgage. He argues that, assuming the trial court was correct in ruling he did not have an interest in the note and mortgage at the commencement of the lawsuit to recover under his complaint, he obtained an interest during the prosecution of the action by the reconveyance of the property by Margaret Landis to appellant. Appellant contends that under Arkansas Rule of Civil Procedure 13(d), a claim that was acquired after filing shall be presented as a counterclaim. Further, he maintains that under Rule 15(a), the trial court may strike the amended pleading, or grant a continuance. Appellant also argues that under Rule 15(d), the trial court should have made a determination as to whether appellee would have been prejudiced because of the filing of a supplemental pleading. He claims the trial court failed to make such a finding, nor did the trial court determine that the cause would be unduly delayed. *See* Ark. R. Civ. P. 15(d); *Toney v. Haskins*, 271 Ark. 190, 608 S.W.2d 28 (1980).

Appellant's arguments regarding Rules 13 and 15 were not presented to the trial court pursuant to appellant's abstract filed in this appeal. These arguments may be summarily disposed of, as they were not preserved below. This court has consistently refused to hear arguments raised for the first time on appeal. *See, e.g., Elser v. State*, 353 Ark. 143, 114 S.W.3d 168 (2003); *Mayes v. State*, 351 Ark. 26, 89 S.W.3d 926 (2002); *Rodgers v. State*, 348 Ark. 106, 71 S.W.3d 579 (2002).

Affirmed.

PITTMAN, C.J., and GRIFFEN, J., agree.

